Government or of a Department of the Government of the United Kingdom, and I have no doubt that he is a public officer: *Henley v. Mayor of Lyme*[1]. If the garnishee were a public officer of this Colony, money held by him in that capacity could not be attached without the written consent of the Attorney-General or other officer specified in Order XLI., r. 4 (2) of the Rules of the Supreme Court, but the Command Paymaster is not a public officer within the meaning of this Rule.

The Attorney-General has not given his sanction to the present attachment, and in my opinion he could not give it, at any rate, not without specific authority from His Majesty in His Government in the United Kingdom, to give such sanction.

There is no suggestion that the Command Paymaster in his private and personal capacity is indebted to anyone. The plaintiffs are described in the Writ of Summons as sub-contractors and the defendants as general contractors, and the claim is for money due by the defendants for work done at Gillman Barracks and another place. These are military works and I have no doubt that if Shun Fah & Co. are owed any money the money is owed under a contract made by the Military authorities on behalf of the War Office or the Crown in the Government of the United Kingdom, and that no action would lie against an individual so long as he had authority to contract and did not contract in his personal capacity; *Macbeath v. Haldimand*[2]; *Palmer v. Hutchinson*[3]; and the public officer who signed the contract could not be sued as agent of the Crown; *Dunn v. Macdonald*[4].

Any claim which Shun Fah & Company may have to payment could only be enforced by a petition of right and the plaintiffs cannot be in a stronger position as against the Crown with whom they have no contract at all.

No fiat could be given under s. 21 of the Crown Suits Ordinance because such proceedings would not be against the Crown in right of the Colony because the debt is not a debt due by the Colony and the judgment would not be satisfied out of the Colony revenue; *Frith v. The Queen*[5]; *Doss v. Secretary of State for India in Council*[6]. An action against the Crown in right of the United Kingdom would not lie in the Courts of the Colony unless the Crown in that right submitted to the jurisdiction.

For purposes of litigation the Crown is often not one and indivisible as may be seen in actions between the Crown in right of a Canadian Province and the Crown in right of the Dominion. So a tax due to the Crown in one part of His Majesty's Dominions cannot be sued for in another part; *Municipal Commission of Sydney v. Bull*[7]. This distinction between the different capacities of the Crown is touched on in the Workmen's Compensation Ordinance, s. 2, where it is enacted that a person is not a workman within the meaning of the Ordinance who is "in the civil employment of His Majesty otherwise than in His Government of the Colony".

In the notes to Order XLV., r. 1 of the Rules of the English Supreme Court is a quotation from *Robertson's* "Civil Proceedings against the Crown": "Garnishee orders nisi against Government Departments have from time to time been discharged with costs, as in *Higgins v. Bussy, Broadbent v. Sanders,* and *Bennett v. Taverner*". None of these cases is reported. I have no difficulty in reaching the same conclusion without their aid.

Section 11 of the Courts Ordinance gives the Court no jurisdiction to order the attachment of this money, and if Orders XLI., and XLIII., conferred such power they would be *ultra vires,* because rules made under s. 88 of the Courts Ordinance must be confined to regulating matters which the Court can do.

If Order XLI., r. 4 were capable of having two interpretations, one *intra vires* and the other *ultra vires* I think the principle enunciated by Lord Halsbury in *McLeod v. Attorney-General of New South Wales*[8] should be applied and the Rules Committee presumed to have made rules which were within their powers. The *intra vires* construction should be accepted and the *ultra vires* rejected.

The garnishee notice is set aside with costs.

*Order Accordingly.*

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## CHING CHONG KIAT vs. THE ASIATIC PETROLEUM CO. (S.S.) LTD.

[Orig. Civil Juris. (Aitken, J.) August 11, 1941]

RETIRING FUND CONTRIBUTIONS.

The plaintiff was a contributor to a Retiring Fund instituted by the defendant company and the plaintiff signed an application form applying to be admitted as a contributor to the Fund and agreeing to be bound by the provision of the Trust Deed relating to the same and by the rules of the Fund or other rules which might thereafter be in force.

One of the rules provided that the trustees of the Fund could at any time exercise their discretion under Rule 17 of the rules and pay out to the plaintiff the full amount standing to his credit in the books of the Fund without waiting for the expiration of 20 years from the date of the plaintiff joining the defendants' service; which period was the normal time when the amount standing to the plaintiff's credit in the Fund might be paid out to him.

**Held**, that the plaintiff was bound by the rules of the Fund especially Rule 23 and that the Plaintiff had no right to immediate payment; the trustees having exercised the discretion given to them by the rules in refusing to pay the money out to him.

*Cases referred to:—*

(1) *Re H. E. Cordeiro* (1932) M.L.J. 51; (1932) S.S.R.L. 139.

(2) *Gosling v. Gosling* 70 E.R. 423.

*Re. H. E. Codeiro*[1] distinguished.

TRIAL.

*Chong Thutt Pitt* for plaintiff.

*C. H. Smith* for Defendants.

The facts and arguments sufficiently appear from the judgment.

*Cur. Adv. Vult.*

**Aitken, J.** : —Some time ago the defendants started a Retiring Fund scheme for their employees other than labourers and menial servants.

The main feature of the scheme is that monthly contributions from their wages shall be made by the employees who have become members of the scheme, and that for every contribution so made by an employee an equal contribution shall be made by the defendants. A separate acount of these contributions is kept for each member of the scheme, and the moneys so standing in his name are credited with interest every year if the general fund of the scheme has earned interest.

The moneys so accumulated for each member of the scheme were, and still are, intended to provide an allowance for his or her old age upon ceasing to be employed by the defendants after at least 20 years service. But I understand that the defendants have, from the very inception of the scheme, usually paid over to members who left their service before the expiry of 20 years from becoming such members the full amount standing to their credit in the books of the scheme at the date of the cessation of their employment. I also understand that the defendants have hitherto paid over the full amount standing to the credit of a a deceased contributor to his legal personal representa tive within a reasonably short period after death.

In September 1932 the defendants — apparently for the first time — reduced this Retiring Fund Scheme of theirs into the formal legal shape of a Trust Deed supplemented by a considerable body of written rules. After studying that deed and those rules I have come to the conclusion that they are probably the result of the case on which Mr. Chong Thutt Pitt for the plaintiff relies so strongly, namely the case of *Re H. E. Cordeiro*[1].

But before I proceed to consider the law it is necessary to outline the facts as briefly as possible.

The Plaintiff became a member of the defendants' Retiring Fund on the 1st of November, 1933, and before he became a member thereof he had signed and sent in the standard form of application then in use the operative part whereof reads as follows :—

> "I, the abovenamed.....hereby request that I may be admitted as a member of the abovenamed Fund and in consideration of the contributions to be made to the Fund by the Companies I agree with the Trustees, the Companies and the other members to be bound by the provisions of the Trust Deed and by the Rules of the Fund or other Rules which may hereafter be in force".

On the 31st of October, 1940, he left the Defendants' service of his own accord and for reasons of his own. The amount then standing to his credit in the books of the Retiring Fund scheme was $1,250.03, and it is admitted that his work and conduct throughout the whole period of his service with the defendants — the 1st of November, 1932 to the 31st of October, 1940 — were satisfactory.

On the 5th of November, 1940, Mr. Chong Thutt Pitt, on behalf of the plaintiff, wrote to the defendants, as Trustees of the Fund, asking them to exercise their discretion under rule 17 of the Rules in favour of the plaintiff, and to let him have the full amount standing to his credit in the books of the Fund.

Next day the defendants replied to Mr. Chong Thutt Pitt's letter in the following terms :—

> "We thank you for your letter of the 5th November in which you request that the Trustees of the Asiatic Petroleum Co., (S.S.) Ltd. Malaya Retiring Fund should exercise their discretion by not applying Rule 16 and by paying out the amount standing in the name of Ching Chong Kiat in the books of the Malaya Retiring Fund.
>
> You will no doubt appreciate that the object of the Malaya Retiring Fund is to assist members of our staff to save against their retirement after a long period of service with the Company. There is no doubt at all that your client is not contemplating retirement and this being the case, the Trustee is not prepared to exercise its discretion. The amount standing in the name of Ching Chong Kiat in the books of the Malaya Retiring Fund will be paid to him when 20 years have expired from the date when he joined the Company".

Now the amount of $1,250.03 standing to the plaintiff's credit in the books of the Fund is made up as follows :—

| | | |
|---|---|---|
| Plaintiff's contributions | .. .. | $ 668.30 |
| Defendant's contributions | .. .. | 668.30 |
| | | 1,336.60 |
| Less due on loan account | .. .. | 86.57 |
| | | $1,250.03 |

In this action the plaintiff claims that he is entitled to the whole amount of $1,250.03 because, according to him, rule 16 of the Rules which empowers the defendants, in their trustee capacity, to retain it until 20 years from the date of his joining the defendants' service have elapsed, is "oppressive, and unfair and against public policy". As an alternative he claims the amount of his own contributions, i.e. $668.30 as

"money had and received by the defendants to the use of the plaintiff"

In their Defence the defendants say that they were entitled to withhold payment of the whole sum of $1,250.03 under the Rules, and deny the epithets applied by the plaintiff to rule 16.

Mr. Chong Thutt Pitt should have mentioned in the Writ of Summons, and in the Statement of Claim, I think, that the defendants are being sued as the Sole Trustee of the Asiatic Petroleum Company (Straits Settlements) Limited Malaya Retiring Fund. In order that I may deal with this case on its merits, I give the plaintiff leave to make the necessary amendments in his Writ of Summons and Statement of Claim.

And now for the Law. I have already mentioned that Mr. Chong Thutt Pitt places great reliance on *Re H. E. Cordeiro (supra)*, which according to him is directly in point. I must therefore examine that case thoroughly and carefully.

The head note in the report, so far as it is material for the purposes of this case, reads as follows :—

> At the request of certain approved employees a bank consented to deduct 5 per cent from the salary of each on the understanding that the bank would contribute four times the amount and allow interest on the total and pay the whole sum to the employee on the termination of his service. The bank furnished to each such employee a half-yearly statement of "the balance standing to his credit in the Provident Fund". There was, in fact, no fund and no appropriation of assets or securities for the purpose, but the bank made provision in its accounts and balance-sheets by including the total among its general liabilities.
>
> One such employee having been made bankrupt the Official Assignee claimed the amount standing to his credit in this account.
>
> **Held**, that the bank had constituted itself a trustee of the whole amount of the contributions by both parties, and that the Official Assignee was entitled to payment out irrespective of whether the bankrupt's services had been terminated or not.

Turning to the judgment, I find that the learned Judge considered that the Bank had constituted itself a trustee of the sum of £2,550. 10s. 5d. for Mr. Cordeiro because, on the 31st of December, 1931, it had informed him, in writing, that the balance standing to his credit in the officers' provident fund on that date amounted to £2,550. 10s. 5d. (sterling). The learned Judge then continued :—

> This is a definite statement by the bank that this sum has been given to the employee. The gift is an accomplished fact and therefore the bank holds as trustee. It seems to me that although this may well be in the nature of a bonus for which there is no consideration, yet once the bonus is declared the donor becomes a voluntrary trustee of it for the donee until it is actually handed over to the donee.

Having arrived at the conclusion that the Bank held the £2,550. 10s. 5d. as a trustee for Mr. Cordeiro, the learned Judge applied the rule in *Gosling v. Gosling*[2] to that trust and held that the £2,550. 10s. 5d. was Mr. Cordeiro's absolute property, and therefore passed to the Official Assignee on the former's bankruptcy.

Between that case and this it seems to me that there are several important differences.

In that case there does not appear to have been any Trust Deed or Rules to define the constitution of Provident Fund and regulate the rights of the contributors thereto; in this case there are.

In that case "there was, in fact, no fund and no appropriation of assets or securities for the purpose"; in this case, as I understand the position, there is both a separate fund and an appropriation of assets and securities for its purpose.

In that case it was held that the Bank had constituted itself a trustee for Mr. Cordeiro in the definite sum of £2,550. 10s. 5d. (sterling). In this case rule 11 of the Rules expressly provides that no entry in any of the Fund's accounts, nor the delivery to a member of any statement showing the state of his personal account in the Fund's books, shall be construed as any admission or declaration of trust..... nor shall any such entry or any such statement in any way affect the rights of any of the members or the Trustee ....under these rules.

Apart from those important differences it is to be observed that the Plaintiff in this case agreed to be bound by the Rules in consideration of the contributions to be made to the Funds by the defendants or their subsidiary Companies. In my opinion he is bound by them, and if he is, then the provisions of rules, 16, 17 and 23 clearly put him right out of Court. Rules 16 and 17 give the defendants, as the sole Trustee of the Fund, a discretion as to whether they should pay the plaintiff when he left their employment or on the expiration of 20 years from the date upon which he entered their service; and rule 23 provide as follows :—

> No member shall have any claim right or interest upon or in respect of the Fund or any contributions thereof or any interest thereon or any claim upon or against the Trustee except under and in accordance with the provisions of the Trust Deed and the Rules.

To my mind the principle of *Re Cordeiro* has no application to the facts and circumstances of this case. and I am of opinion that the plaintiff's claim fails in *toto* because the defendants, in withholding payment of the moneys claimed, have only exercised the discretion given to them by the rules. It is not suggested that they have exercised their discretion against the plaintiff's application for immediate payment from any improper motive, and in view of the express object of the Fund and the defendants' generous contributions thereto. I cannot agree that rule 16 is either oppressive, or unfair or against public policy.

*Claim Dismissed.*